Supreme Court, U.S.
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No. 98-2052

In The

Supreme Court of the United States

DREW FENTON, M.D. and KLAUS WAGENER,

Petitioners,

vs.

UNIHEALTH AMERICA, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

RESPONDENTS' ALAN HEILPERN, M.D. AND CALIFORNIA EMERGENCY MEDICINE SPECIALISTS MEDICAL GROUP, INC. BRIEF IN OPPOSITION

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ADDITIONAL QUESTIONS PRESENTED

1. Does the United States Supreme Court have jurisdiction, and should review be granted, of a factually intensive medicare issue analyzing how 42 U.S.C. § 1395u (entitled "Use of carriers for administration of benefits") applies to petitioners as independent contractor doctors when petitioners did not raise this issue in the trial court and instead asserted at trial that they were employees?

2. Is review of a federal issue proper – here, application of 42 U.S.C. § 1395u – where there are nonfederal grounds under the substantial evidence standard of review resulting in the state court's decision finding no breach of fiduciary duty and that petitioners were not entitled to an accounting?

PARTIES TO PROCEEDING

The petition identifies only respondent "UNI-HEALTH AMERICA, INC." in the caption. It does not identify, as required by Rule 14 subdivision 1(b), all respondents in the caption or in a list within the petition.

Other parties to the state court lawsuit included defendants California Emergency Medicine Specialists Medical Group, Inc. ("CEMS") and Alan Heilpern, M.D., represented by Rushfeldt, Shelley & Drake LLP, and California Medical Center, Los Angeles ("Medical Center"), who is represented by separate counsel.

RULE 29.1 LISTING

CEMS has no parent corporation and there is no publicly held corporation owning 10% or more of the corporation's stock.

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OPINIONS AND ORDERS BELOW

The documents listed below are reprinted in the Respondent's Appendix ("RA") to this opposition.

Petitioners' May 30, 1996 "REQUEST FOR STATEMENT OF DECISION AS TO FIRST, SECOND, THIRD AND FOURTH CAUSES OF ACTION" is at RA 1-5.

The trial court's June 4, 1996 "STATEMENT OF DECISION" on the first through fourth causes of action tried by the court is at RA 6-8.

JURISDICTION PROBLEMS

Petitioners assert this court has jurisdiction over the factually intensive question of whether 42 U.S.C. § 1395u applies to foreclose petitioners – two doctors – from assigning medicare proceeds to a medical corporation. But petitioners did not comply with the Rule 14, subdivision 1(g)(i)[1] requirement that in showing this court has jurisdiction, the petition must specify

> the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts.

Petitioners cannot comply with Rule 14 because they did not ask the trial court to address the issue they now

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[1] All rule citations are to the United States Supreme Court Rules, effective May 3, 1999.

raise (RA 1-5), so the trial court did not pass on it (RA 6-8). Petitioners instead raised it for the first time on appeal. The California Court of Appeal rejected petitioners' argument, and had sufficient nonfederal grounds to support the opinion under the substantial evidence standard of review. This court does not review issues not properly raised below, nor does it review issues on which there is a sufficient alternative nonfederal basis for the state court opinion.

STATEMENT OF CASE

1. Overview

In this factually intensive case, petitioners were emergency room doctors who sued defendants and respondents Medical Center, CEMS – the corporation responsible for staffing the Medical Center's emergency room, and Alan Heilpern, M.D. – CEMS's owner. Petitioners asserted they were entitled to a share in all profits earned by CEMS, and sued CEMS and Heilpern for (1) breach of contract/promissory estoppel, (2) an accounting, and (3) breach of fiduciary duty. In addition, petitioner Drew Fenton individually filed a cause of action under California's Fair Employment and Housing Act ("FEHA"; Cal. Govt. Code § 12940).

Petitioners' claims seeking CEMS's profits were decided in a bench trial. This was followed by a jury trial on Fenton's FEHA claim. All claims were unsuccessful. A judgment against petitioners was entered based on the decision of the trial judge from the bench trial and the jury verdict on Fenton's remaining FEHA cause of action.

The resulting final judgment was affirmed in full on appeal.

Petitioners ask this court to review the unpublished California appellate opinion affirming the judgment in favor of CEMS, Alan Heilpern, M.D., and Medical Center. But the issue petitioners now raise (1) was never asserted at the trial level, (2) is factually the opposite of what petitioners did assert, which was that they were employees, not independent contractors, and (3) was rejected by the court of appeal after it applied nonfederal law to affirm the judgment.

2. The Trial.

At trial, petitioners claimed CEMS and Heilpern breached a fiduciary duty and that petitioners were entitled to an accounting that would give them all profits of CEMS. Their argument was that Heilpern, who owned CEMS, who had to obtain personal loans to pay the physicians when funds were not timely received, and who incurred all the financial risk under the staffing contract with the Medical Center, was required to disperse all profits to the doctors, so that he would have no profit motive and at best would only break even for all of his efforts in staffing the Emergency Room and paying that staff. AA 6-11.

But the evidence at trial was that petitioners agreed to be paid and in fact were paid a guaranteed hourly rate plus a percentage of a pool reflecting their percentage contributions of public and insurance funds collected for the month, and in return, the doctors assigned to CEMS

all such funds received for treating emergency room patients. AA 24.

During the bench trial, petitioners insisted and in fact introduced extensive expert testimony that they were *employees* of CEMS. They also called as a trial witness Barbara Rawinowitz, a representative from American Insurance Administrators (i.e., the "carrier" in this case who would be regulated by section 1395u). She provided no testimony that any medicare funds were improperly paid in violation of section 1395u.

Petitioners never asked the judge presiding over the bench trial to make a finding as to whether 42 U.S.C. § 1395u, which expressly regulates medicare "carriers", entitled *petitioners* to more money from *CEMS*, or to decide whether petitioners were employees or independent contractors which might have impacted an analysis of whether section 1395u applied.[2]

After a full bench trial, the trial judge rejected petitioners' claims for more money.

3. The Appeal

The court of appeal affirmed the entire judgment, finding there was substantial evidence to support the findings from the bench trial, and that there was no error as to the jury trial portion of the case. AA 1-28.

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[2] In the subsequent jury trial, the jury was asked to decide whether Fenton was an employee for the purpose of entitling him to seek recovery under the FEHA.

In reviewing the bench trial portion of the judgment, the court of appeal rejected petitioners' new claim, raised for the first time on appeal, that 42 U.S.C. § 1395u somehow mandated a different result and a finding that petitioners' assignments of funds were void.

Petitioners filed a petition for rehearing, and CEMS and Heilpern filed an answer, both identifying factual errors in the opinion. The court issued an order that corrected certain parts of the opinion but did not change the holding. AB 1-2.

Petitioners filed a petition for review to the California Supreme Court for review of the FEHA issue and the 42 U.S.C. § 1395u issue. That petition was denied. AC-1.

4. Summary Of Why This Petition Should Be Denied.

The petition for writ of certiorari should be denied because

(1) There are multiple and serious failures of jurisdiction:

(a) petitioners never raised the issue at trial and never obtained a ruling from the trial court on the factually intensive issue they now ask this court to decide,

(b) the factual and legal arguments petitioners made at trial (they asserted they were employees) are the opposite of what they now assert (they assert they are entitled to a recovery because they were independent contractors), and

(c) the court of appeal opinion is based on an independent and adequate nonfederal ground; the court of appeal must presume that the trial court made all factual findings supported by substantial evidence necessary to support the judgment and there was substantial evidence under California law to support the trial judge's finding of no breach of fiduciary duty and no right to an accounting,

(2) The issue does not involve conflicting opinions or important issues of law,

(3) The statute in question expressly regulates medicare carriers. It was not enacted to give doctors a right to rescind fully performed agreements with Medical Groups. Petitioners should not be rewarded for changing their position after trial so they can dishonor an agreement that CEMS has fully performed.

5. Misrepresentations Concerning The Facts And Procedural Posture.

The petition fails to disclose that during both the bench trial portion of the case and jury trial portion, petitioners aggressively asserted that they were *employees* of CEMS, not independent contractors. They introduced expert testimony at both phases of trial that they were CEMS employees. (3 RT 393-401; 7 RT 1074-1083.) Because petitioners asserted throughout trial that they were employees, the "independent contractor" issue they now raise contradicts their trial position.

The petition fails to disclose that petitioners did not argue at trial, nor did they request that the trial court

decide, that 42 U.S.C. § 1395u foreclosed independent contractors from assigning medicare funds. RA 1-5.

The petition fails to disclose that the contracts petitioners entered into with CEMS to provide emergency room services stated that petitioners assigned to CEMS all of the money they generated from public funds or other sources that paid for treatment of patients, and in return, petitioners were guaranteed and paid an hourly fee by CEMS. (1 RT 70, 74; 2 RT 354-355; 4 RT 715-719; exhs. 304-306.)

The petition fails to disclose that at trial petitioners called as a witness Barbara Rawinowitz, a representative from American Insurance Administrators (i.e., the "carrier" in this case). She provided no testimony that any medicare funds were improperly paid.

REASONS FOR DENYING THE PETITION

I. THERE IS NO JURISDICTION TO GRANT CERTIORARI BECAUSE PETITIONERS DID NOT TIMELY RAISE THIS FACTUALLY INTENSIVE ISSUE IN THE TRIAL COURT WHERE PETITIONERS TOOK A FACTUALLY AND LEGALLY OPPOSITE POSITION.

Generally, petitioners must follow state procedure in timely raising a federal question. When required by state practice, the federal issue must be raised initially in the trial court. In California, petitioners are required to raise an issue at the trial level to preserve the issue for appellate review, otherwise it is deemed waived. *Marriage of*

Arceneaux, 51 Cal.3d 1130, 1133-1134 (1990); *Marriage of Hoffmeister*, 191 Cal.App.3d 351, 359 (1987).

In a nonjury trial, the trial court is required, upon timely party request, to render a "statement of decision" explaining the factual and legal basis for its decision as to each principal controverted issue for which any party requests such a statement. Cal. Code Civ. Proc. § 632.

Petitioners requested a statement of decision from the trial court but their request did *not* ask the judge to address the question of whether 42 U.S.C. § 1395u was violated by any party or prohibited petitioners from assigning their right to medicare funds, or whether the medicare carrier violated 42 U.S.C. § 1395u by paying medicare funds to CEMS.[3] RA 1-5. Nor did it request the trial judge to decide whether petitioners were employees

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[3] The portion of 42 U.S.C. § 1395u that petitioners claim was violated is subdivision (b)(6)(A) and (B), which state in pertinent part:

> (A) payment may be made to the (i) employer of such physician or other person . . . or (ii) (where the service was provided in a hospital . . .) to the facility in which service was provided if there is a contractual arrangement between such physician or other person and such facility under which such facility submits the bill for such service, (B) payment may be made to an entity (i) which provides coverage of the services under a health benefits plan, but only to the extent that payment is not made under this part, (ii) which has paid the person who provided the service an amount . . . which that person has accepted as payment in full for the service, and (iii) to which the individual has agreed in writing that payment may be made under this part,. . . .

or independent contractors. RA 1-5. The trial court issued a statement of decision that did not mention 42 U.S.C. § 1395u or medicare, since it was never asked to do so.[4] RA 6-8.

On appeal, the statement of decision provides a record of the trial court's reasoning on particular disputed issues, which the appellate court may review when deciding whether the decision is supported by the evidence and law. *Marriage of Ditto*, 206 Cal.App.3d 643 (1988). Where a party fails to timely bring an alleged deficiency, omission, or ambiguity in a requested statement of decision to the trial court's attention, the defects in the statement are waived unless clarification was timely requested before entry of judgment. Cal. Code Civ. Proc. § 634; *Marriage of Arceneaux*, 51 Cal.3d 1130, 1133-1134 (1990). The appellate court then must assume the existence of any findings favorable to respondent in support of the judgment. *Marriage of Arceneaux*, 51 Cal.3d 1130, 1133-1134 (1990); *Marriage of Hoffmeister*, 191 Cal.App.3d 351, 359 (1987).

Applying this law to the appeal of the bench trial determination of various issues, the Court of Appeal in affirming the judgment (1) applied the substantial evidence standard of review, (2) found under the facts in the record that there was substantial evidence to support the trial judge's findings, (3) could reject – as waived and

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[4] Petitioners also made no claim or argument as to 42 U.S.C. § 1395u in their complaint, in either of their two trial briefs, or in their arguments at trial. It's no wonder the trial court never addressed the issue.

inconsistent with the substantial evidence test – petitioners' new claim that their assignments of funds were void under 42 U.S.C. § 1395u, and (4) could reject petitioners' 1395u argument as contrary to their theory of trial – petitioners offered no testimony from the carrier of any impropriety in payment of medicare funds, and instead insisted and presented evidence at both the bench trial and in the jury trial portion of the case that they were employees, not independent contractors.

The issue petitioners now raise – whether section 42 U.S.C. § 1395u prevents *independent contractors* from assigning funds – was simply never raised or decided at trial, since it was inconsistent with petitioners' theory of trial which was that they were *employees*. In fact, petitioners put on extensive expert testimony at trial claiming they were employees. AA 11-12; 3 RT 393-401; 7 RT 1074-1083. The trial court was not asked, nor did its statement of decision make any findings as to 42 U.S.C. § 1395u or petitioners' status as employees or independent contractors. RA 6-8.[5] Petitioners also conceded they assigned all medicare funds to CEMS. In view of these facts and the implied findings required of a statement of decision, the court of appeal had only one proper choice under the applicable standard of review, which was to affirm the trial court's judgment on the statement of

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[5] Only *after* the bench trial and statement of decision issued, did the jury trial proceed and result in a special verdict against Fenton alone on his FEHA cause of action finding that he was not an employee. Even after the jury concluded that Fenton was not an employee, he did not go back to the court and ask it to determine the effect of section 1395u on the statement of decision if he was not an employee.

decision and to reject petitioners' late raised claim that 42 U.S.C. § 1395u somehow mandated a different result.

Similarly, the court of appeal rejected petitioners' claim that the interpretation of 42 U.S.C. § 1395u by the HCFA Medicare Carriers Manual allowed them to avoid their assignment of medicare funds because they were not CEMS employees. Petitioners had requested the court of appeal to take judicial notice of the Medicare Carriers Manual, section 3060.2, while at the same time conceding that it did not even exist during trial or when the contract between petitioners and CEMS was in effect. The court of appeal made no detailed finding or analysis concerning application of its provisions to the facts of the case, or to the trial evidence. The court of appeal simply stated that it did not know why the HCFA would take a position contrary to the express language of the medicare statute.

The court of appeal's conclusion that there was substantial evidence in support of the statement of decision fully addresses the issue on a nonfederal basis, and is correct based on the rule of inferred findings of the trial judge. No further analysis was needed as to 42 U.S.C. § 1395u.

Nor do the court of appeal's cursory, advisory comments rejecting petitioners' 1395u argument provide a sufficient analysis to make review of this part of the opinion useful. The issue is both factually intensive and legally complex and should not be addressed here in a hypothetical situation after petitioners (1) failed to give the trial court any opportunity to address the issue, and

(2) took an opposite factual and legal approach throughout trial, asserting they were employees and not independent contractors.

II. THE PETITION SHOULD BE DENIED BECAUSE AN ADEQUATE AND INDEPENDENT NONFEDERAL GROUND SUPPORTS AND MANDATES THE STATE COURT OPINION.

Where an adequate and independent nonfederal ground exists to support a decision, the supreme court has no jurisdiction to review the case. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 211 (1935).

> Our only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion. . . . [and even if] it is not clear whether the judgment rests on a federal ground or an adequate state one, this Court will not review. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945), disapproved in part on other grounds by *Michigan v. Long*, 463 U.S. 1047 (1983).

An adequate and independent nonfederal ground supports the court of appeal's decision denying petitioners' claims for breach of fiduciary duty and an accounting.

State law determined whether there was a breach of fiduciary duty, and whether an accounting was required.

And the substantial evidence standard of review controlled the court's review of the trial court findings on these issues. The opinion correctly concluded "Substantial Evidence Supports the Trial Court's Findings Heilpern was Not Acting as a Fiduciary for Wagener and Fenton." AA 22-24. The court also found based on substantial evidence that petitioners failed to establish they were denied any funds under the contract, and there was no misappropriation by Heilpern, who was entitled to keep the profits from the business. AA 6-11, 27-28. Thus, no accounting was justified.

Petitioners' unsuccessful theory at trial was that they were entitled to an accounting because they did receive all the profits and the productivity formula was not properly administered. They relied on state law in asserting their right to recovery. But there was voluminous, substantial evidence from trial that supported the trial court's decision rejecting plaintiffs' accounting and breach of fiduciary duty claims. AA 6-11.

The trial evidence established that pursuant to the agreement between petitioners and CEMS, CEMS paid petitioners a timely and guaranteed hourly rate of pay plus a percentage of a pool of insurance and public funds for their work in the emergency department. CEMS then bore the entire burden, expense, and risk of the collection efforts required to obtain the insurance and public funds petitioners assigned to it, which included significant delays and overhead costs in procuring the funds. Heilpern also incurred the expense and risk of obtaining personal loans to pay the doctors when public or insurance funds were not promptly received.

Petitioners' complaint and trial strategy did *not* include a claim for rescission of their assignment of funds on the ground that it was void, invalid, or contrary to 42 U.S.C. § 1395u. They knew any rescission claim would be fruitless where, as here, they had already ratified the agreement by accepting all the benefits and full performance under the contract for five years without questioning the assignment provision. *Neet v. Holmes,* 25 Cal.2d 447, 458 (1944) [a party knowing facts warranting rescission ratifies the contract by continuing to accept its benefits and may not thereafter rescind the agreement]. It was too late to void or rescind the assignment after it was fully performed. That is why at trial petitioners' approach was to simply seek additional funds by presenting a factual claim that funds should have been distributed differently under the productivity formula.

Although not expressly discussed in the court of appeal opinion, there was another basis for rejecting petitioners' 1395u argument; petitioners waived any claim based on 42 U.S.C. § 1395u because they did not ask the trial court to make any findings or ruling based on that theory. The waiver is understandable since their 1395u theory contradicts their trial theory where they insisted they were employees.

Independent and adequate state grounds support the judgment.

III. PETITIONERS DO NOT MEET THE RULE 10 STANDARDS FOR REVIEW ON A WRIT OF CERTIORARI.

The state court of last resort here made no decision conflicting with another court, and no federal question was raised by petitioners at the trial level. Thus, the Rule 10(b) requirements for review are not met.

Rule 10(c) provides for review when

> a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

But the state trial court in this case did not decide *any* question of federal law, nor does the court of appeal opinion conflict with any other decision or decide with any precision the question raised here – whether independent contractor physicians can assign medicare benefits to a medical corporation in exchange for a fixed fee for their services. The court of appeal opinion's mention of section 1395u is very brief. There is nothing for this court to review and no law to be settled.

IV. THE FACT SPECIFIC MEDICARE ARGUMENT IS MERITLESS; SECTION 1395U WAS ENACTED TO REGULATE MEDICARE "CARRIERS", BUT NO CARRIERS ARE PARTIES TO THIS ACTION SO IT CANNOT BE THE BASIS FOR CHALLENGING THE JUDGMENT.

Petitioners' issue – albeit convoluted – proceeds as follows. They cite a statute regulating *medicare carriers*,

they ask this court to interpret the statute to regulate *doctors*, and they then attempt to force *CEMS* to pay them money on the theory that they, as doctors, violated the statute by assigning funds to CEMS. Logic is absent.

Title 42 U.S.C. § 1395u is entitled "Use of carriers for administration of benefits". This is part of the medicare administration statute, which expressly allows "carriers" to be used to administer medicare benefits. 42 U.S.C. § 1395u(a). "Carrier" is defined by 42 U.S.C. § 1395u(f), which provides that a "carrier" is a

> non-governmental organization which is lawfully engaged in providing . . . the cost of, health services under group insurance policies or contracts . . . in consideration of premiums or other periodic charges payable to the carrier. . . .

This is not a case about or against medicare carriers or any other insurer authorized to administer medicare payments. There is no claim that any defendant was a medicare carrier or that any carrier violated 1395u. In fact, petitioners even called a representative from American Insurance Administrators (i.e., the "carrier" in this case), Barbara Rawinowitz, as a witness at trial. She provided no testimony that any medicare funds were improperly paid. There was no evidence that the medicare carrier in this case violated section 1395u.

The statutory regulations controlling medicare "carriers" cannot be used, as petitioners attempt, to get money from CEMS by asserting *petitioners* violated 1395u, and therefore *CEMS* owes them money. The statutory provision petitioners rely on directly regulates medicare

carriers – not doctors, not medical corporations, not hospitals.[6] There is no provision in the statute allowing doctors to use the statute as a sword, to avoid and rescind their assignment contracts and obtain medicare money – not from the medicare "carrier", but from non-carrier individuals or corporations to whom the doctors assigned those funds.

Petitioners rely on an HCFA "Medicare Carriers Manual" in trying to support their petition. The provisions they cite from the carriers' manual were never presented or argued to the trial court. The manual did not even exist either at the time of trial or from 1989 to 1994, the contract years in question.

Moreover, given the trial evidence and the rule of implied findings supporting the statement of decision, nothing in the medicare statute forbids petitioners from (1) assigning their rights to such funds to CEMS, (2) allowing the carrier to pay CEMS the funds, and (3) allowing CEMS to collect the funds.

Petitioners' issue is meritless.

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[6] Petitioners also assert that the regulations covering section 1395u provide that medical corporations cannot receive medicare payments. Cert. Pet. 10. But the regulations they cite contain no such provisions.

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be denied.

Dated: July 23, 1999

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DREW FENTON, M.D. KLAUS WAGENER, M.D. Plaintiffs, v. UNIHEALTH AMERICA, INC. ET. AL. Defendants.	CASE NO: BC 123041 REQUEST FOR STATEMENT OF DECISION AS TO FIRST, SECOND, THIRD AND FOURTH CAUSES OF ACTION (Filed May 30, 1996)

Plaintiffs, DREW FENTON, M.D. and KLAUS WAGENER, M.D., in the above-entitled action, hereby requests that the court issue a statement of decision explaining the factual and legal bases for its decision regarding the following controverted issues:

FIRST CAUSE OF ACTION

1. Whether or not Plaintiff WAGENER should be entitled to a judgment of damages for Breach of Promissory Estoppel on the part of Defendants, ALAN HEILPERN and CALIFORNIA EMERGENCY MEDICINE SPECIALISTS, INC.;

2. Whether or not Plaintiff WAGENER should be entitled to a judgment of damages for Breach of Implied-In-Fact Employment Contract between Plaintiff and Defendants HEILPERN and CALIFORNIA EMERGENCY MEDICINE SPECIALISTS, INC.;

SECOND CAUSE OF ACTION

3. Whether or not Plaintiff FENTON should be entitled to damages for Breach of Promissory Estoppel on the part of Defendants, ALAN HEILPERN and CALIFORNIA EMERGENCY MEDICINE SPECIALISTS, INC.;

4. Whether or not Plaintiff FENTON should be entitled to a judgment of damages for Breach of Implied-In-Fact Employment Contract between Plaintiff and Defendants HEILPERN and CALIFORNIA EMERGENCY MEDICINE SPECIALISTS, INC.;

THIRD CAUSE OF ACTION

5. Whether or not Plaintiffs WAGENER and FENTON are entitled to an accounting from Defendants HEILPERN and CALIFORNIA EMERGENCY MEDICINE SPECIALISTS, INC. with full disclosure of all financial matters including billings and earnings pertaining to said

Plaintiffs employment as emergency physicians at CALIFORNIA MEDICAL CENTER.

FOURTH CAUSE OF ACTION

6. Whether or not Defendants HEILPERN and CALIFORNIA EMERGENCY MEDICINE SPECIALISTS, INC. agreed orally that they would act as each of the Plaintiffs agents for the purpose of collecting billings of each Plaintiff for his services in the emergency department at CALIFORNIA MEDICAL CENTER and that they would render true and correct accountings to each of the Plaintiffs for and on account of the amounts received and amounts disbursed.

7. Whether or not said Defendants HEILPERN and CALIFORNIA EMERGENCY MEDICINE SPECIALISTS, INC. have a duty to render a formal accounting to said Plaintiffs as fiduciaries.

DATED: May 29, 1996

FIZZOLIO & McLEOD
AND ROBERT GERSTEIN

BY: /s/ James M. Fizzolio
James M. Fizzolio
Attorney for Plaintiffs,
DREW FENTON, M.D.
and
KLAUS WAGENER, M.D.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 15260 Ventura Boulevard, Suite 1230, Sherman Oaks, California 91403.

On May 29, 1996 I served the foregoing document described REQUEST FOR STATEMENT OF DECISION AS TO THE FIRST, SECOND, THIRD AND FOURTH CAUSES OF ACTION the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Linda Miller, Esq.
RUSHFELDT, SHELLEY & DRAKE
12925 Riverside Drive, Fourth Floor
Sherman Oaks, CA 91423

James Bertero, Esq.
MUSICK, PEELER & GARRETT
225 Broadway, Suite 1900
San Diego, CA 92101-5028

[X] BY MAIL

[ ] I deposited such envelope in the mail at Sherman Oaks, California. The envelope was mailed with postage thereon fully prepaid.

[X] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Sherman Oaks, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed

invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. Executed on May 29, 1996 at Sherman Oaks, California.

[ ] BY PERSONAL SERVICE, I delivered such envelope by hand to the addressee. Executed on ___ at Sherman Oaks, California.

[X] State I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] Federal I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Lisa Gaur
Lisa Gaur

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DREW FENTON, M.D.; KLAUS WAGENER, M.D., Plaintiffs, vs. UNIHEALTH AMERICA, INC., a corporation; ALAN HEILPERN, M.D., an individual, Defendants.	Case No. BC 123041 STATEMENT OF DECISION (Filed Jun. 4, 1996)

The first through fourth causes of action were tried in Department 17 of the above-entitled court, May 13 - 21, 1996. Plaintiffs were represented by James M. Fizzolio of Fizzolio and McLeod and defendant were represented by Linda Miller and Gordon Kojima of Rushfeldt, Shelley and Drake. Oral and documentary evidence was received. On May 20, 1996, defendants' motion for nonsuit was granted as to the first and second causes of action pursuant to Code of Civil Procedures section 631.8 and denied as to the third and fourth causes of action. The court's statement of decision as to the first through fourth causes of action follows

1. *Promissory Estoppel – Drew Fenton*

2. *Promissory Estoppel – Klaus Wagener*

The court finds that defendant Alan Heilpern solicited plaintiffs to become partners in an enterprise to solicit and obtain contracts to run emergency rooms. The solicitation was an offer to begin negotiations to see if the parties could agree on the terms of the partnership. Eventually they could not. The original solicitation/offer was no more than an offer to agree in the future. Defendant did not promise to agree to any specific terms; to the extent the defendant did promise plaintiffs' partnership shares, the promise was not enforceable. Even assuming an enforceable promise, there was no credible evidence that defendant did not intend to perform that promise when made. Each side hired an attorney and there ensued six months of negotiations; each side incurred attorney fees with respect to these negotiations. The only inference of a promise without intent to perform is the failure to agree on the partnership details. This is insufficient evidence to sustain plaintiffs' burden of proof.

4. *Breach of Fiduciary Duty* – Plaintiffs allege that in mid-1992, defendant created a new way of compensating the emergency room doctors, plaintiffs included. Plaintiffs allege that participating doctors agreed to accept a lower hourly wage in return for defendant's promise to create a new compensation pool consisting of all monies received by him and generated by participating doctors. Defendant contends that the new pool was not all the money generated by the doctors' efforts, but rather a pool consisting of the money produced by reducing the doctors' previous hourly wages. These monies were to be re-

allocated according to the amounts each generated – thus increasing the total compensation to those working harder. Plaintiffs contend that distribution of the new pool as they saw it created a fiduciary duty by defendant toward them.

The court finds that defendant did not intend to nor did he create a pool of money consisting of all monies generated by the plaintiffs. Defendant properly distributed the money due defendants. No fiduciary duty was created; even if it could be argued that one was created, defendant properly disbursed the monies due plaintiffs.

3. *Accounting* – The court finds judgment for defendant inasmuch as the money was properly distributed.

The sixth cause of action for sexual discrimination and sexual harassment remains set for jury trial. Upon conclusion of the jury trial, defendant shall submit a judgment to this count which conforms with this statement of decision and the eventual jury trial.

Dated: JUN - 4 1996

RICHARD KALUSTIAN
RICHARD P. KALUSTIAN
Judge of the Superior Court